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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JOE LOPEZ,

Defendant and Appellant.

B266011

(Los Angeles County  
Super. Ct. No. MA016657)

APPEAL from an order of the Superior Court of Los Angeles County.  
Willicam C. Ryan, Judge. Affirmed.

Barbara A. Smith, under appointment by the Court of Appeal, for  
Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant  
Attorney General, Lance E. Winters, Assistant Attorney General, Steven D.  
Matthews and Corey J. Robins, Deputy Attorneys General, for Plaintiff and  
Respondent.

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Joe Lopez (defendant) appeals from the trial court’s post-judgment order denying his petition for recall of sentence and resentencing pursuant to Penal Code<sup>1</sup> section 1170.126, also known as Proposition 36 and the Three Strikes Reform Act. Defendant contends (1) the trial court committed reversible error in failing to apply the definition of “unreasonable risk of danger to public safety” found in section 1170.18, also known as Proposition 47; (2) his trial counsel’s failure to argue that the Proposition 47 definition was applicable constituted ineffective assistance of counsel; and (3) the trial court abused its discretion in determining that he was a risk under the definition found in Proposition 36. We affirm the trial court’s order. Proposition 47’s definition of unreasonable risk of danger does not apply to Proposition 36 petitions, and defense counsel was not deficient in failing to argue that it did. The trial court did not abuse its discretion in denying defendant’s petition because he posed an unreasonable risk of danger to public safety.

## BACKGROUND

In 1995, defendant was sentenced to 18 years four months in state prison for robbery. In 1998, defendant was convicted of possessing heroin in prison in violation of section 4573.6. The sentencing court determined that defendant had suffered four prior felony convictions within the meaning of the Three Strikes law (§§ 667, subds. (b)—(i); 1170.12) and sentenced defendant to a term of 25 years to life for the heroin possession offense. In January 2013, defendant filed his petition to recall his 1998 third strike sentence pursuant to Proposition 36.

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<sup>1</sup> All further unspecified statutory references are to the Penal Code.

## DISCUSSION

### I. Proposition 47

While defendant's Proposition 36 petition was pending in the lower court, California voters passed Proposition 47, which changed specified narcotics and theft-related offenses from felony offenses to misdemeanors.<sup>2</sup> Defendant contends the trial court abused its discretion in failing to apply Proposition 47's definition of "unreasonable risk of danger to public safety" to its analysis of his Proposition 36 petition. He further contends his counsel was ineffective for not making this argument to the court.

#### A. *Background*

In November 2012, California voters passed Proposition 36, which modified the Three Strikes law to permit 25-year-to-life sentences in most cases only when the third or subsequent felony conviction is for a serious or violent felony. The proposition permits defendants previously sentenced to 25 years to life for a nonserious, nonviolent third felony conviction to petition for recall of their sentences. An eligible defendant is entitled to resentencing unless the court "in its discretion, determines that resentencing the [defendant] would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).) Proposition 36 does not provide a further definition of "unreasonable risk of danger to public safety." It simply provides that the court, in exercising its discretion, may consider the defendant's criminal history, his disciplinary and rehabilitation record while incarcerated and any other relevant evidence. (§ 1170.126, subd. (g).)

In November 2014, California voters passed Proposition 47 which changed specified narcotics and theft-related offenses from felony offenses to

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<sup>2</sup> Possession of heroin in state prison in violation of section 4573.6 is not one of those offenses.

misdemeanors. That proposition also provides that an eligible defendant is entitled to resentencing unless the court “in its discretion, determines that resentencing the [defendant] would pose an unreasonable risk of danger to public safety.” (§ 1170.18, subd. (b).) Proposition 47, however, specifies that “[a]s used throughout this Code, ‘unreasonable risk of danger to public safety’ means an unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667.” (§ 1170.18, subd. (c).)

Soon after the passage of Proposition 47, courts began considering whether the proposition’s definition of “unreasonable risk of danger to public safety” applied to Proposition 36 petitions. This issue is now pending before the California Supreme Court. (*People v. Chaney* (2014) 231 Cal.App.4th 1391, review granted Feb. 18, 2015, S223676; *People v. Valencia* (2014) 232 Cal.App.4th 514, review granted Feb. 18, 2015, S223825.)

## **B. Analysis**

We conclude that Proposition 47’s narrower definition of “unreasonable risk of danger to public safety” does not apply to an evaluation of a petition filed under Proposition 36. (See *People v. Esparza* (2015) 242 Cal.App.4th 726, 736-737 (*Esparza*), abrogated by *People v. Cordova* (2016) 248 Cal.App.4th 543, 552, fn. 8, review granted Aug. 31, 2016, S236179.)

As the court in *Esparza* explained: “Plainly, if considered solely as a matter of grammatical construction, Proposition 47’s definition of ‘unreasonable risk of danger to public safety’ undoubtedly is tied to the words ‘As used throughout this Code.’ However, such a literal construction is not to be adopted if it conflicts with the voters’ intent shown in the official ballot pamphlet. [Citations.] Nothing in the official ballot pamphlet for Proposition 47 hints at any impact on the procedure for resentencing three strike

inmates.” (*Esparza, supra*, 242 Cal.App.4th at p. 736.) Defendant has not shown such an intent.

In addition, the timing of Proposition 47’s enactment is inconsistent with an intent to apply its definition of risk to Proposition 36. Proposition 36 gave defendants two years from its enactment to file their petitions for resentencing.<sup>3</sup> (§ 1170.126, subd. (b).) Proposition 47 was enacted two days before that deadline. (§ 1170.18.) Nearly all Proposition 36 petitions would have been filed, and many adjudicated by the time Proposition 47 passed. It is unlikely that any rational voter would have intended to change the rules for Proposition 36 at such a late date.

## **II. Ineffective Assistance of Counsel**

Defendant’s counsel did not file any supplemental pleadings asking the court to apply Proposition 47’s definition of risk to defendant’s pending Proposition 36 petition or directing the court’s attention to the California Supreme Court’s grant of review in *Chaney* and *Valencia*. There is nothing to indicate that counsel argued for such an application at the June 2015 suitability hearing.

Defense counsel’s failure to argue that Proposition 47’s definition of risk applied to Proposition 36 did not constitute ineffective assistance of counsel. In order to establish such a claim, defendant must show that his counsel’s performance fell below an objective standard of reasonableness, and that, but for counsel’s error, a different result would have been reasonably probable. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.)

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<sup>3</sup> Petitions may be filed after two years, but only upon a showing of good cause. (§ 1170.126, subd. (b).)

As we have just explained, Proposition 47's definition of risk does not apply to Proposition 36 petitions. A defense counsel is not required to make unmeritorious arguments on a defendant's behalf. (See *People v. Ochoa* (1998) 19 Cal.4th 353, 432 [counsel is not deficient for failing to make a meritless motion to exclude].) Clearly, there is no reasonable probability of a different outcome if counsel makes such an unmeritorious argument. Defendant's claim fails.

### **III. Denial of Defendant's Proposition 36 Petition**

Defendant contends that even under Proposition 36's unmodified definition of risk, the trial court abused its discretion in finding that he posed a serious risk of danger to public safety. Defendant asserts the trial court did not "establish the nexus" between past behavior and current dangerousness.

#### **A. Law**

Proposition 36 leaves the determination of a defendant's risk of danger to the court's discretion. (*Esparza, supra*, 242 Cal.App.4th at p. 735.) The proposition specifies that, in determining if a defendant poses an unreasonable risk of danger, the court may consider: "(1) The petitioner's criminal conviction history, including the type of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes; [¶] (2) The petitioner's disciplinary record and record of rehabilitation while incarcerated; and [¶] (3) Any other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety." (§ 1176.126, subd. (g).)

A defendant's dangerousness need not be established by proof beyond a reasonable doubt to a jury. (*People v. Superior Court (Kaulick)* (2013) 215

Cal.App.4th 1279, 1303.) The proper standard of proof is a preponderance of the evidence. (*Id.* at p. 1305.)

We review the trial court's decision under the deferential abuse of discretion standard. The court's ruling will not be reversed on appeal unless defendant demonstrates that the court exercised its discretion in "an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

### **B. Ruling**

The trial court issued a 15-page memorandum of decision explaining its ruling on defendant's petition. The court discussed the details of defendant's lengthy criminal history, which dates back to 1978, and of defendant's behavior while in prison for the commitment offense. The court also considered defendant's drug addiction; his lack of participation in substance abuse prevention, vocational, school or work programs; and his inadequate post-release plans. In addition, the court considered a number of mitigating factors, including defendant's age, health and classification score.

Defendant was convicted of possession of a controlled substance in 1978 or 1979, 1980 and 1983. In 1986, he was convicted of robbery; a co-perpetrator in the robbery had a firearm. He was committed to the California Rehabilitation Center and ultimately discharged in 1992. That same year, he was again convicted of possession of a controlled substance. In 1993, while on probation, he was convicted of second degree burglary of a school. He was released on parole and violated his parole several times. In 1995, while on parole, defendant was convicted of three counts of robbery, being a felon in possession of a firearm and evading a peace officer. While in prison in 1998, he was convicted of the current offense of possession of heroin

in prison. Defendant's wife brought him 2.5 grams of heroin in balloons, which defendant swallowed. Prison officials were required to obtain a court order for a laxative to force defendant to pass the balloons.

Defendant received nine disciplinary serious rules violations (RVR's) between 2000 and 2012. Four RVR's were drug related: two for drug possession, one for possession of drug paraphernalia and one for distribution of drugs. The 2006 RVR for distribution of drugs involved defendant's swallowing seven balloons of heroin weighing 13.5 grams. Four additional RVR's were for failure to obey a direct order. One RVR was for battery with a weapon on a fellow inmate.

The court also considered defendant's general lack of preparation for his post-release life. Defendant did not have any satisfactory or better performance in work, school or vocational training. He did not provide the court with any post-release plans.

The court recognized that defendant had a drug addiction, but also found that when he "has been given the opportunity to address his drug addiction, he has consistently reoffended." As the court noted, defendant "sustained a conviction for possession of heroin in state prison, despite being in a controlled environment with programs available to assist him with his drug addiction." After receiving a life sentence for this conviction, defendant "was found with heroin in his possession again seven years later." The court pointed out that defendant had not engaged in any self-help or programming while in prison to overcome his drug addiction. The court found defendant had not shown that he had learned to control his drug addiction.

Turning to mitigating factors, the court recognized that defendant's age, 56, was an age by which criminality normally has "drastically" declined. The court also acknowledged that defendant had "some medical ailments" but

had not provided the court with any supporting evidence concerning his specific medical conditions. Thus, this was a weak mitigating factor at best. The court also noted that defendant entered prison with a classification score of 90, which increased to 126 by 2007 and declined to 106 by May 2012. The decline in score was attributable to defendant's lack of RVR's. It would have declined more rapidly if he had achieved satisfactory ratings in work, school or vocational training.

The court found an “undeniable link between [defendant's] history of substance abuse and criminal behavior.” In summary, the court found that defendant's “extensive criminal record, prison misconduct, lack of any rehabilitative programming, lack of re-entry plans, and other relevant factors support a finding that resentencing [defendant], at this time, would pose an unreasonable risk of danger to public safety.”

### **C. *Analysis***

According to defendant, the trial court failed to consider that the entire sentencing landscape has altered dramatically since defendant received his third strike sentence and so erroneously relied on an outdated definition of risk which included property crimes. He further contends the court cited inapplicable and inappropriate parole cases.

#### **1. Definition of risk**

Defendant maintains that Proposition 36 requires a risk of danger to the public's physical safety, not merely of danger to property. He claims the trial court was stuck in the “bad old days, when 25 years to life was just fine, for stealing a slice of pizza.”

The trial court stated, correctly, that the “concept of public safety does not contemplate merely the absence of violent acts, it also includes the absence of property crimes. (See *People v. Nasalga* (1996) 12 Cal.4th 784, 790

[“the Legislature believes that it is in the best interest for public safety to enhance the penalties for the crimes of vehicle theft and receiving stolen vehicles.”].)”<sup>4</sup> California law recognizes a wide variety of property crimes, ranging from petty theft and shoplifting to robbery and carjacking. Some property crimes such as robbery, carjacking, and residential burglary carry the risk of violence. Even after the sentencing reforms of the past decade, robbery remains a violent felony which as a third strike conviction triggers a 25-year-to-life sentence. (§§ 1170.12, subd. (c)(2)(C), 667.5. subd.(c)(9).) Thus, the armed robberies committed by defendant in the past are a far cry from snatching a slice of pizza.

Defendant claims the trial court’s citation to *Nasalga* was a “tacit” acknowledgement that defendant was not likely to be violent if released. We do not understand the trial court’s references to *Nasalga* and property crimes as being a prediction that defendant would commit only nonviolent property crimes in the future. As the trial court pointed out, defendant’s prior robbery convictions involved the use of a firearm and his burglary involved extensive property damage to a school. Thus, the fact of his prior convictions do show that defendant was willing to use violence to obtain property, even if he did not ultimately inflict violence.

## 2. Parole

Defendant contends the trial court relied inappropriately on parole review cases in deciding his petition.

Some reference to parole review cases is appropriate in Proposition 36 cases. “A trial court’s decision to refuse to resentence a prisoner, based on a finding of dangerousness, is somewhat akin to a decision denying an inmate

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<sup>4</sup> The Court is quoting from *In re Pedro T.* (1994) 8 Cal.4th 1041, a case which considered a temporary increase in punishment for vehicle-related theft. (*People v. Nasalga, supra*, 12 Cal.4th at p. 790.)

parole.” (*Kaulick, supra*, 215 Cal.App.4th at p. 1306, fn. 29.) Thus, parole review cases may, to some extent, help inform the trial court’s resentencing decision under Proposition 36. (See *Esparza, supra*, 242 Cal.App.4th at pp. 745-746 [discussing *In re Shaputis* (2008) 44 Cal.4th 1241 and *In re Lawrence* (2008) 44 Cal.4th 1181, both parole cases].)

Defendant complains generally that parole decisions apply a different standard of proof and require a more deferential standard of review than do Proposition 36 resentencing decisions. The trial court clearly set out the appropriate standard of proof and standard of review for Proposition 36 decisions in its memorandum of decision. He points to nothing suggesting that the trial court incorrectly applied the lower and less deferential standards for parole hearings to its Proposition 36 decision.

Defendant complains of only two specific cases cited by the trial court, *In re Rozzo* (2009) 172 Cal.App.4th 40 and *In re Bettencourt* (2007) 156 Cal.App.4th 780. Defendant argues that Rozzo was a “racist torture murderer” and Bettencourt was a “crazy and evil” murderer, while he is simply a small-time robber. The court cited those cases for the general proposition that “rules violations in prison constitute powerful evidence of an inmate’s current willingness to engage in serious rule-breaking and are probative of recidivist tendencies and the danger to public safety.” This general rule is not dependent on the inmate’s prior crimes or character.<sup>5</sup>

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<sup>5</sup> The specific danger to public safety posed by an inmate does depend on the nature of the inmate’s past crimes and of the rules he broke in prison, but the record shows that the trial court did look at the particulars of defendant’s crimes and rules violations. Nothing in the record remotely suggests the trial court viewed defendant as the equivalent of a dangerous murderer.

### 3. Nexus

Defendant characterizes himself as an aging addict and contends there is no rational nexus between his past crimes and what he is likely to do if released pursuant to Proposition 36. He contends the trial court abused its discretion in finding there is such a nexus.

The court correctly recognized that a history of recidivism and even an inability to refrain from re-offending while in the community or incarcerated were not sufficient, standing alone, to prove current dangerousness. The trial court found, however, that his lack of participation in substance abuse programs or any vocational programs while in prison, together with his inadequate plans for re-entry into society, provided a link between his criminal past and current dangerousness.

Defendant has a long history of drug abuse and addiction and has been unable or unwilling to control or overcome his addiction, which was so severe that on two occasions he swallowed a large quantity of heroin with no regard for his own safety. As the trial court found, even assuming that defendant had refrained from using drugs since his last drug-related RVR in 2006, more is required to overcome addiction: “Addicts in recovery must also learn to avoid the triggers that lead to relapse and avoid situations and behaviors that place them at risk.” Since defendant has not been involved in any substance abuse programs while in prison, there is no basis to conclude that he has learned appropriate behaviors. He remains at risk for a relapse into drug abuse if released, a risk that is heightened by his lack of post-release plans. A relapse would increase his risk of theft-related crimes to pay for his drugs.

The trial court correctly considered all the evidence relevant to a determination of defendant’s risk of danger, including mitigating factors such

as age and health. The court did not abuse its discretion in finding that defendant would pose an unreasonable risk of danger to public safety if resentenced under Proposition 36.

DISPOSITION

The court's order is affirmed.

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GOODMAN, J.\*

We concur:

ASHMANN-GERST, Acting P.J.

HOFFSTADT, J.

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\* Retired judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.